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Muddy Waters: The Rights to Conserved Water in Idaho

by

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MUDDY WATERS: THE RIGHTS TO CONSERVED WATER IN IDAHO

I. INTRODUCTION

Idaho's agriculture and industrial prosperity rely on optimum use of state water supplies. In this arid western state water is a valuable resource which makes proficient water management a requirement. This article begins by exploring the rights of Idaho irrigators who employ conservation measures in diverting, transporting, or applying water for irrigation. Conservation measures include lining ditches to minimize seepage, using pipelines to reduce evaporation during the transportation of water, leveling land, and sprinkling crops rather than row irrigating them to decrease the amount of waste water that runs off a field.[1] Whether the conserved water is returned to the stream flow and again subject to appropriation, or whether it becomes the property of the person who conserved it, is a question which has not yet been answered by Idaho law.

This article argues that Idaho would be best served by adopting laws which grant rights to conserved water to those employing conservation measures on their property. Support for this position is essentially a policy argument: State policy requiring efficient use of water will be obtained by encouraging conservation and granting rights in the conserved water to those responsible for its conservation.

II. A LOOK AT OTHER JURISDICTIONS

Idaho is not alone in failing to codify, or specifically address through case law, the rights of irrigators who employ conservation measures; Washington, Montana, Utah, Nevada, and Colorado do not have specific statutes defining the rights of conservers. The states that have defined irrigators' rights to conserved water are Oregon, California, and Arizona. Oregon and California have specific statutes that deal with conserved water,[2] while Arizona is governed by case law.[3]

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1. R. Dewsnup, *Legal Aspects of Water Salvage* 20-21 National Water Commission Legal Study No. 8-C, 1971.

2. OR. REV. STAT. §§ 537.455-500 (1989); CAL. WATER CODE §§ 1010 - 1011 (West 1990).

3. *See* Salt River Valley Water Users' Ass'n v. Kovacovich, 3 Ariz. App. 28, 411 P.2d 201 (1966).

A. Oregon

Oregon recognizes that the efficient use of water is beneficial to all water users. It is policy in the state of Oregon to "(a) [a]ggressively promote conservation; and (b) [e]ncourage the highest and best use of water by allowing the sale or lease of the right to the use of conserved water."[4] The Oregon Code defines efficient use of water as the use of water without waste.[5]

The Oregon Code requires the party conserving water to request approval of the conservation plan by submitting a conservation proposal to the Water Resources Commission.[6] If the proposal is approved the conserved water will be allocated by the Water Resources Commission.[7] Unless the commission finds reason to allocate more or less water,[8] twenty-five percent is allocated to the state[9] to maintain return flows, and the remaining percentage becomes the property of the conserving party.

The legal status of conserved water in Oregon is equivalent to any other water right for which a certificate has been issued,[10] meaning that the person implementing the conservation measures is given a priority right to use the conserved water.[11] The codification of Oregon's state policy, advancing beneficial and efficient uses of water, specifically addresses the question presented by this article. Although Oregon provides that a portion of the conserved water shall be allocated to the state, appropriators are encouraged to conserve water because they are granted rights to the water they save.

B. California

California also encourages a reduction in water use by allowing those who conserve water to sell, lease, transfer, or exchange their rights in the conserved water.[12] Conserved water is defined by Califor-

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4. OR. REV. STAT. § 537.460 (1990).
5. *Id.* § 537.460(3) (1989).
6. *Id.* § 537.465.
7. *Id.* § 537.470.
8. *Id.* § 537.480.
9. *Id.* § 537.470.
10. *Id.* § 537.500.
11. *Id.* § 537.475(3) provides in part: " . . . [A] separate new certificate indicating the priority of rights as set forth in O.R.S. 537.485 shall be issued to cover the right to the use of the conserved water." § 537.485 reads: "[T]he priority of any right to the use of conserved water under a proposal submitted and approved by the Water Resources Commission . . . shall be one minute after the priority of the water right held by the person implementing the conservation measures."
12. CAL. WATER CODE § 1011(b) (West 1990).

nia as the "use of less water to accomplish the same purpose or purposes of use allowed under the existing appropriative right."[13] California, unlike Oregon, claims no right to the conserved water; instead the state promotes conservation by giving appropriators full right to all excess water they obtain through conservation practices.[14]

Both California and Oregon are attempting to influence their water users by offering them rights to the water they conserve. Each state has converted its policy of efficient water use into progressive state law. The codification of these policies leaves both California and Oregon prepared to properly manage their water as the population of the dry western regions continues to grow.

C. Arizona

Although most western states recognize that efficient use of water is favorable, not all have adopted the same methods as Oregon and California in encouraging its productive use. In undertaking to maintain adequate water supplies, Arizona has taken a different direction. Arizona has chosen not to grant the rights of conserved water to appropriators implementing conservation methods. In the 1966 appellate court decision of *Salt River Valley Water Users' Association v. Kovacovich*,[15] Arizona declined to allow a landowner, with a valid appurtenant water right, to apply conserved water to immediately adjacent lands owned by him. The court held that irrigators "may only appropriate the amount of water . . . as may be beneficially used in any given year upon the land to which the water is appurtenant even though this amount may be less than the maximum amount of their appropriation."[16] Explaining that "commendable practices do not in themself create legal rights,"[17] the court established the precedent in Arizona. The court held that "the Doctrine of Beneficial Use precludes the application of waters gained by water conservation practices to lands other than those to which the water was originally appurtenant."[18]

Kovacovich reached the conclusion that the beneficial use of conserved water by the individual conserving it is invalid; one may never take more water than can be beneficially applied to the appurtenant

13. *Id.* § 1011(a).
14. *Id.*
15. 3 Ariz. App. 28, 411 P.2d 201 (1966).
16. *Id.* at 30, 411 P.2d at 203.
17. *Id.*
18. *Id.*

land.[19] Other appropriators may benefit in an unusually dry year from the extra water supplied by conservation practices. However, rights to conserved water can never be acquired by individuals who conserve in an attempt to obtain more water. The only valid use of appropriated water in Arizona is the beneficial use upon the land to which the water is appurtenant.[20] The benefit to those employing conservation measures, and economically appropriating water in Arizona, is merely acknowledgement that such practices are to be highly commended.[21]

Although the economical use of water has been characterized as commendable, admirable conduct provides little incentive for irrigators to employ conservation measures or explore more efficient methods of irrigation when the water they conserve will become the property of the state. In Arizona, the labors of an appropriator employing conservation measures are not effectively rewarded. Appropriators can freely conserve water but may never receive the excess; therefore, there is no incentive to exercise conservation practices. The rationale for Arizona's rule is that all excess water should belong to the state so that it may be properly managed. In promulgating this rule, the *Kovacovich* court failed to consider that a more effective way to promote beneficial use of water is to grant those who exercise conservation measures the rights to such water. Arizona is likely encouraging waste by suggesting that the only reward for conservation is a clear conscience. Perhaps the most striking evidence that Arizona's rule will not result in better use of water is that the *Kovacovich* rationale stands alone in the western states;[22] its holding has never been cited or used in any other western case.

Arizona, California, and Oregon have directly addressed the issue of an irrigator's rights to conserved water. Other states, such as Utah, Colorado, and Wyoming have not specifically dealt with the issue; however, they allow expanded uses of water as long as such use does not result in injury to other appropriators.[23]

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19. *Id.*

20. *Id.* at 30, 411 P.2d at 202-3.

21. *Id.*

22. Western states include: Washington, Oregon, California, Idaho, Utah, Nevada, Arizona, Montana, Wyoming, and Colorado.

23. *See* Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982), and East Bench Irr. Co. v. Deseret Irr. Co., 2 Utah 2d 170, 271 P.2d 449 (1954). *See also* WYO. STAT. § 41-3-101 (1977) which requires appurtenance to the land much like *Kovacovich*. However, G. Weatherford in *Water and Agriculture in the Western U.S.: Conservation, Reallocation, and Markets* 217 (1982) claims that "there is a clear trend [in Arizona] toward allowing transfers away from the land when an entire water right is transferred. It is not at all clear, however, that a similar result would be reached when a transfer of a partial water right created through 'saving' is involved."

III. SALVAGED AND DEVELOPED WATER

Courts often use the terms salvaged and developed water interchangeably in their decisions. Although similar, the definitions of salvaged and developed water are not parallel. Salvaged waters are obtained by making improvements to waterways, whereas developed waters are those that are added to an existing waterway.[24] Salvaging water may include improvements such as removing phreatophytes; developing water may include digging a canal that will empty into another water supply. One author describes the difference in the following manner: "Salvaged waters are already in the area or close to it and are saved and restored to the supply within the area by artificial means; developed waters are not present in the area until brought there by means of artificial devices."[25]

Another term, "augment," which means to supplement or increase,[26] is also utilized by courts to describe both developed and salvaged water. Whether or not conserved water is included within the meaning of these terms is unclear. The inconstant labeling of Idaho waters has left an uncertainty concerning the rights of appropriators who conserve, salvage, or develop water.

A. *Reno v. Richards*

By increasing the supply of irrigation water, an Idaho appropriator may obtain rights to the enlarged amount of water.[27] Idaho cases dealing with the rights to "augmented" water come close to answering the question presented by this article—does an irrigator employing conservation measures have the right to the water conserved by her efforts. The treatment of augmented water cases in Idaho is fundamental in analyzing the rights of conservers and in predicting the future directions of Idaho courts. The leading Idaho case on augmented water is *Reno v. Richards* in which the Idaho Supreme Court held:

> A person who, by removing obstructions from a stream and constructing artificial works, *prevents the loss* of water flowing therein through seepage and evaporation, and materially *augments* the amount of water available from the stream for a

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24. WATERS AND WATER RIGHTS § 3.2(D) (R. Clark 1967). *See also*: R.J.A., Inc. v. Water Users Ass'n of Dist. No. 6., 690 P.2d 823 (Colo. 1984) (the addition of waters to the stream in developing water cannot be from a source already tributary to that stream).

25. 2 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 565 (1972).

26. WEBSTER'S NEW COLLEGIATE DICTIONARY 115 (9th ed. 1985).

27. *See* Reno v. Richards, 32 Idaho 1, 2, 178 P. 81, 82 (1918).

> beneficial use, has the right to make use of the amount of water so conserved by his efforts in *excess* of the natural flow of the stream.[28]

According to the definitions of augmented, salvaged, and developed water, *Reno* should be considered a "salvaged" water case. The appellants removed brush and fallen logs from a waterway along with excavating channels through sand bars to augment their water supply.[29] The appellants did not bring waters from another source to the channel; they merely cleared the way making it possible for more water to reach the channel. The appellants referred to this water as "conserved" water and cited developed water cases to support the argument that they had rights to it.[30] The court also employed the terms "saved" and "conserved"[31] when referring to the water. Either the Idaho Supreme Court interpreted salvaged and conserved as synonyms, or it was careless in the application of the terms.

A distinction can be drawn between augmented water, which has been used to include salvaged or developed water, and conserved water. Conserved water is the amount that remains after an owner makes a more efficient use of the water, while augmented water adds to or supplements an existing supply of water, as was the case in *Reno*. For example, if X had ten eggs and used only one in a recipe which called for two, one egg will have been saved or conserved. However, if two eggs were used in the recipe, but an additional egg was purchased, the supply of eggs will have been supplemented or augmented. In both situations nine eggs remain.

Regardless of these differences, *Reno* appears to support allowing conserved water to become the property of the conserving party. By equating augmented water with conserved water, any excess water, including conserved, could potentially become the property of the appropriator responsible for generating the additional amount. On the other hand, *Reno* can be compared to *R.J.A., Inc. v. Water Users Ass'n of Dist. No. 6*,[32] a Colorado case in which water salvaged by phreatophyte removal was not granted to the appropriator due to environmental concerns. *Reno* and *R.J.A.* are similar factually, yet each court reached different conclusions.

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28. *Id.* at 1, 178 P. at 82-83 (emphasis added).
29. *Id.* at 6, 178 P. at 82.
30. *Id.* at 6, 178 P. at 82-3.
31. *Id.* at 3, 178 P. at 85.
32. 690 P.2d 823 (Colo. 1984).

B. The Dilution of *Reno*

In *In Re General Determination of Rights to Use of Surface & Ground Waters of Payette River Drainage Basin*,[33] the Idaho Supreme Court accurately interpreted *Reno* to mean that augmented water could become the property of the person supplementing the supply. Although this case does not deal with conserved water, it is applicable to demonstrate the Idaho Supreme Court's interpretation of developed and salvaged water. In *Determination of Rights*, the appellants argued that the development of a mine, which led to the open flow of water from the mine portal, created developed water in which they had rights under *Reno*.[34] The court held, however, that such water was not developed water since the mine owners were not responsible for adding to or preventing loss in the water supply—they were only responsible for bringing water to the surface.[35] The court distinguished *Reno* by stating: "We do not have here a case in which the flow of a stream is augmented by the removal of growth from the beds and banks of the stream or augmentation as a result of improved irrigation or diversion techniques as in the cited cases [*Reno*]."[36] The court correctly identified that the water was not developed, but in doing so indicated that *Reno* dealt with developed water rather than salvaged water; the court also referred to improved irrigation as augmentation which is clearly incorrect.

Developed water, by definition, must not have been tributary to the original stream; simply "preventing loss" is not "developing." The court further seems to suggest that only when water supplies are *augmented* should rights to the additional water be granted. If *Reno* is to be interpreted as asserting that only augmented water can be granted to persons increasing the stream flow, then conserved water, which is arguably different, may not be included in the group of excess waters to which rights can be obtained. When an appropriator employs conservation methods, water is not added to the stream flow, the amount required is simply lessened. On the other hand, the reference to "improved irrigation or diversion techniques" may imply that the court would not limit *Reno*'s application to augmenting the water supply with stream channel improvements.

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33. 107 Idaho 221, 687 P.2d 1348 (1984).
34. *Id.* at 225, 687 P.2d at 1352.
35. *Id.*
36. *Id.*

C. Out-of-State Confusion

Out-of-state cases dealing with developed, salvaged, and conserved water offer little guidance to the issue presented here. Colorado, like Idaho, has held that when water is added to the stream supply, the person enlarging the amount of water is entitled to that amount.[37] However, even though Colorado courts recognize a right to developed water, they have restricted that right as evidenced in *R.J.A., Inc. v. Water Users Association of District No. 6*.[38] This restriction indicates that the move from *Reno* to solving the issue presented by this article, is not as logical as it first appears. In *R.J.A.*, one party applied for the rights to developed water[39] he had saved by removing peat moss from a 3000 year old marsh in which water was collecting. The applicant argued that since he removed the vegetation, he was entitled to the net gain in the stream that resulted. The court rejected the application for developed water by distinguishing the present situation from other developed water cases. The court admitted that one who increases the flow of a natural stream by adding water *that would not otherwise reach the stream* is entitled to the use of the water to the extent of the increase.[40] The court observed, however, that the water claimed had always been tributary to the river and was therefore not developed or new water, but salvaged; as a result, the developed water cases did not apply.[41] The *R.J.A.* court properly interpreted the meaning of developed waters and distinguished them from salvaged waters. It then held, nonetheless, that rights to salvaged waters may not be obtained by the person salvaging them.[42]

The *R.J.A.* decision is based on policy. The court expressed concern about a rule which could promote sweeping destruction of vegetation and plant life near water systems, as well as lead to erosion and possible devastation of wild habitat.[43] Maintenance of the environment, the court believed, must be balanced with the efficient use of

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37. *See* Ironstone Ditch Co. v. Ashenfelter, 57 Colo. 31, 140 P. 177 (1914) and Current Developments, *Phreatophyte Eradication as a Source of Water Rights in Colorado*, 43 COLO. L. REV. 473 (1972).

38. 690 P.2d 823 (Colo. 1984).

39. Developed water is defined in *R.J.A.* at 825, as "addition of water to an existing supply."

40. *Id.*

41. *Id.* at 827, 829.

42. It is not clear whether the *R.J.A.* court interpreted the term augment to mean only developed water, or whether in some cases augmented water, including salvaged, could be awarded to the appropriator.

43. *R.J.A.* at 828.

water.[44] The environmental concerns expressed by the *R.J.A.* court should not be overlooked; proficient use of water can be harmful to the environment and such concerns appropriately enter into judicial decisions.

Conserved water does not expand or add to the natural flow of the stream and therefore does not qualify as new or developed water under *R.J.A.*[45] Since it is not developed water the developed water cases do not apply, and the rights to conserved water can not be obtained.

D. Possible Directions for Idaho

Which way the Idaho courts will decide the issue of conserved water rights is uncertain. On one hand, the policies of conservation may propel an Idaho court to allow developed water cases to apply; on the other hand, courts may give greater weight to environmental considerations and decide not to allow developed water cases to include conservation matters.

Prior to California enacting its statute which grants appropriators rights to conserved water,[46] case law in that state allowed a person augmenting the water supply to obtain rights to the amount of water added to the stream.[47] Perhaps Idaho will follow California's initiative and extend its case law approach to developed water into a comprehensive conserved water statute.

It is unclear whether the Idaho courts will extend the developed water cases so that not only developed waters, but conserved waters as well, become the property of the party conserving or augmenting such water. *Reno* is at least amenable to this concept, as evidenced by the court's language interchanging the terms "saved" and "conserved" water with "salvaged" water. Further, both constitutional and public policy in Idaho pertaining to the beneficial use of water favor such a direction for the state.

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44. *Id.*

45. Conserved water can further be distinguished from developed water within the meaning of *R.J.A.* because conserved water does not fall within waters that would not otherwise reach the stream.

46. CAL. WATER CODE §§ 1010 - 1011 (1989).

47. *See* Churchill v. Rose, 136 Cal. 576, 69 P. 416 (1902); Pomona Land & Water Co. v. San Antonio Water Co., 152 Cal. 618, 93 P. 881 (1908) (rights to developed or salvaged water belong to the person responsible for the increased amount in the water supply).

IV. RIGHTS TO IDAHO'S WASTE WATER

An appropriator's rights to waste water offer insight as to how an Idaho court may answer the question of who has rights to conserved water. If Idaho courts are willing to award the right of recaptured waste and seepage water to the appropriator exerting effort to reuse it, the next logical step is to award appropriators rights to water which they have exerted efforts to save. There are three criteria that must be met in order for legal rights in waste water to vest in the appropriator. First, waste and seepage water[48] must belong to the original appropriator before she can recapture it;[49] second, the original appropriator cannot recapture waste water that she has abandoned;[50] and third, the recaptured waste water must be used beneficially.

A. Recapture of Waste Water

All waste and seepage waters are governed by the policy that first in time is first in right among appropriators.[51] A junior appropriator, although allowed to capture the abandoned waste or seepage of another, has subordinate rights to that water. Someone recapturing waste or seepage from a prior appropriator cannot require that such flow of

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48. *See* Hidden Springs Trout Ranch Inc. v. Hagerman Water Users, 101 Idaho 677, 680, 619 P.2d 1130, 1133 (1980) (no distinction is to be drawn between waste water appropriated after it has been put to irrigation use and waste water seeping from irrigation canals. The court further stated that there is no case law to support a distinction between runoff or seepage which resulted from irrigation and water lost in transit before reaching the point of use).

49. *See* Cleaver v. Judd, 238 Or. 266, 393 P.2d 193 (1964); Fuss v. Franks, 610 P.2d 17 (Wyo. 1980) (if waste and seepage waters flow into the natural stream, they cannot be recaptured unless the source of the waters in the natural stream is solely waste and seepage).

50. *See* Sebern v. Moore, 44 Idaho 410, 258 P. 176 (1927) (the original appropriator has the right to her own waste and seepage water so long as such right has not been abandoned or forfeited and the water is applied to a beneficial use); Thompson v. Bingham, 78 Idaho 305, 306, 302 P.2d 948 (1956) (cites *Sebern* and draws a similar conclusion by stating: "[W]here there has been no appropriation of water the water coming from a drain or seepage water, or waste water, belongs to the owner of the land where it accumulates, but where the water has been appropriated, . . . it belongs to the appropriator, on the theory of (1) prior appropriation (2) abandonment (3) first in time is first in right"); *also* Reynolds Irr. District v. Sproat, 70 Idaho 217, 222, 214 P.2d 880 (1950) (supports this rule by stating: "[S]eepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to beneficial use").

51. *Sebern* at 416, 258 P. at 177.

waste water be maintained.[52] Neither can such junior appropriator acquire a prescriptive right to surface water or seepage water.[53]

The next criterion, abandonment, logically follows recapture because if an appropriator recaptures her waste water, then she has not abandoned or forfeited her rights to it.

B. Abandonment and Forfeiture of Water

In Idaho, forfeiture is defined as failing to use water for a term of five years for the beneficial use for which it was appropriated.[54] Forfeiture for non-use results in the water reverting back to public ownership and once again becoming subject to appropriation.[55] Abandonment requires an intent to abandon along with a showing of an actual surrender of water rights. The distinction between abandonment and forfeiture is that forfeiture is statutory while abandonment is a common law doctrine.

C. Beneficial Use of Waste Water

Idaho's practice of requiring appropriators to make beneficial use of their water encourages efficient irrigation methods. Idaho courts have not specifically defined what is meant by "beneficial use"; however, certain cases which have employed the term "beneficial use" offer guidance in establishing its parameters.[56] The term is applied loosely in order to allow room for various interpretations consistent with other policies governing Idaho's water laws.

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52. *See Hidden Springs Trout Ranch* at 680, 619 P.2d at 1134 ("a senior appropriator of water retains his right to surface waste and seepage water, and may reclaim it even though such water has been used by a junior appropriator. [Further] . . . no appropriator of waste water should be able to compel any other appropriator to continue waste of water which benefits the former"). *See also*, Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 P.2d 1005 (1945), and *Sebern*, 44 Idaho 410, 258 P. 176 (1927).

53. Thompson v. Bingham, 78 Idaho 305, 302 P.2d 948 (1956).

54. IDAHO CODE § 42-222(2) (1990).

55. *Id.*

56. "Beneficial use" of water includes water that has been applied to the irrigation of crops, *see* United States v. Haga, 276 F. 41 (9th Cir. 1921) and *Sebern*, 44 Idaho 410, 258 P. 176 (1927). It also encompasses water used for irrigation of pasture land, *see* Neil v. Hyde, 32 Idaho 576, 186 P. 710 (1919). Other courts recognize broader interpretations of the term. For example, State Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 P.2d 924, E.L.R. 20,508 (1974) found that scenic beauty and recreation were beneficial uses of Idaho's water. It has also been held that reasonable seepage of water does not lead to the conclusion that the appropriator is not beneficially using water. *See Hidden Springs Trout Ranch*, 101 Idaho 677, 619 P.2d 1130. But failure to implement beneficial uses of water was deemed equivalent to abandonment in Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915).

D. The Significance of Beneficial Use

In *United States v. Haga*,[57] the Federal District Court addressed beneficial uses of water and held that the appropriator who uses water for irrigation is entitled to the waste and seepage water as long as the water has not been abandoned and is used beneficially. Arguably, *Haga* supports the position which favors granting conserved water rights to irrigators. The analogy between conserved water, recaptured waste, and seepage water is a logical one: surplus water, if put to a beneficial use, should become the property of the original appropriator. The *Haga* case, however, says only that seepage and waste water can be recaptured and beneficially applied by the original appropriator. Since *Haga* speaks only of beneficial uses to the "project,"[58] it is unclear whether the beneficial use can be any beneficial use or is limited to the beneficial use of the original appropriator.

In light of the Idaho Supreme Court's expansive interpretations of "beneficial uses," it seems logical to extend "beneficial uses" to encompass more than simply beneficial uses to land appurtenant to the water rights.

V. TRANSFERS OF WATER

The Idaho legislature should develop a law which will grant rights in conserved water to appropriators who employ conservation measures. If accomplished, however, restrictions on transfers of water may limit what can be done with the conserved water. Idaho law[59] allows a change in the point of diversion, period of use, place of use, or nature of use, but such change can only occur after application to the department of water resources has been approved.[60] Section 42-222 of the Idaho Code outlines the application process which requires notice and an opportunity to comment. The department can only approve an application "provided no other water rights are injured thereby, the change does not constitute an enlargement in the use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest."[61]

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57. 276 F. 41 (9th Cir. 1921).

58. The "project" is an expansive irrigation system designed by the government and more formally referred to as the Boise-Payette project. It heads in the south bank of the Boise river and supplies water to more than 150,000 acres. *See id.* at 42.

59. IDAHO CODE §§ 42-108, 42-222 (1990).

60. *Id.* § 42-108.

61. *Id.* § 42-222 further explains that a change in the nature of use from agricultural to a use significantly affecting the agricultural base of the local area is forbidden. Additional limitations on approving transfers are described in IDAHO CODE § 42-108 (a

Since a change in the use of water requires the approval of the department of water resources, acquiring the rights to conserved water may not be as liberating as it originally appears. If a conserving appropriator is granted rights to water saved, she may not be allowed to transfer it to lands to which the water is not appurtenant. The effect, therefore, would be similar to *Kovacovich* where water can only be used on land to which it is appurtenant. It is thus essential to consider the effect of transfers of water when promulgating rules concerning rights to conserved water. One suggestion is to develop a law that would consider transfers of conserved water separately from existing transfer rules.

VI. ENVIRONMENTAL CONCERNS REGARDING WATER CONSERVATION

The obvious advantage of conserving water is that it reduces the waste of a limited resource. The return of certain waters to their natural cycle through seepage and evaporation is sometimes considered waste; however, such returns are essential to sustaining a healthy environment. Arguing in support of water conservation would be incorrect without addressing environmental concerns related to water management.

There are many benefits that accompany water conservation other than just an increased availability of water. Water conservation can result in the alleviation of non-point source pollution problems from agricultural runoff and leaching of fertilizers. It can also help maintain minimum stream flows and stop land subsidence resulting from water withdrawals.[62] Further, "reducing withdrawals from surface . . . water supplies may help maintain instream flows, which increase fish and wildlife habitat and aesthetic benefits."[63]

Offsetting the benefits are problems that may arise when conservation methods are employed. Waters that are considered "wasted" or "lost" often return to surface streams and ground water reservoirs where they are again available for use.[64] By conserving water and not

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person may change the point of diversion, period of use, or nature of use so long as the water rights of others are not injured by such changes. Any changes in the period or nature of use for a quantity of water greater than fifty (50) cubic feet per second or for a storage volume greater than five thousand (5,000) acre-feet requires the approval of the legislature, unless it is a temporary change within the state of Idaho for a period of less than three (3) years).

62. WATER CONSERVATION AND WESTERN WATER RESOURCE MANAGEMENT 9-10 (Western States Water Council 1984).

63. *Id.* at 17

64. *Id.* at 7.

allowing such losses to occur, the environment can be negatively impacted. Reducing seepage and runoff "may lower ground water tables and reduce return flows ultimately decreasing instream flows."[65] Such a reduction can have detrimental effects on wildlife. Also, removing phreatophytes from waterways is damaging to wildlife which depend on them as a food source. In addition, such removal will often aesthetically damage the environment.

The benefits and limitations associated with conservation must be taken into account when determining if improved irrigation methods are environmentally justifiable. Conservation is a better policy than dissipation, and there needs to be incentive for practicing conservation. It must be recognized, however, that conservation can have harmful effects on the environment, and the considerations discussed above should not be ignored.

VII. PROPOSAL

This article has shown that conservation practices can be both encouraged and discouraged by state water laws. One study[66] determined that "[t]he majority of western states sampled . . . do not allow the user who saves water to sell the conserved water, removing the incentive for conservation."[67] The reasons cited for this policy are the strict attachments of water rights to the land and the dependence of others on return flow.[68] Implicit in the latter is the "no injury rule" which disallows transfers of water which injure junior appropriators. Because water shortages must be met with the most efficient practices available, conservation must not be discouraged.

The solution proposed by this article is to encourage conservation on the land of the appropriator by granting water saved *on the appropriator's land* to the conserver. Conservation occurring upstream or in rivers, however, must be generally discouraged for the same reasons asserted in the Colorado *R.J.A.* case. Water saved by removing valuable plant life from riverbeds, for example, should not be granted to the person who removed the vegetation. This policy would encourage appropriators to conserve water on their own lands and, at the same time, address the environmental concerns associated with seepage and return

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65. *Id.* at 18.

66. G. Weatherford, *Water and Agriculture in the Western U.S.: Conservation, Reallocation, and Markets* 5 (1982).

67. *Id.*

68. *Id.*

flows. In addition, transfers of conserved water to other lands should be allowed in order to promote conservation.[69]

VIII. CONCLUSION

With no statutory or case law directly on point, the issue of rights to conserved water is still unsettled in Idaho. Allowing owners of water rights to freely use their property, as long as they do not impose hardships on third parties, will result in the most efficient use of Idaho water. To grant water rights to those employing conservation measure would be a rational step for Idaho since such a shift would be consistent with state policies requiring the efficient use and management of water. The approaches taken by Oregon and California further support such a move. These states offer their experience and guidance to Idaho as it formulates similar rules in this area of law. The dry western states are dependent upon the efficient and optimum use of water now and in the future. Idaho, by observing the actions of surrounding states, is in a position to make an informed policy decision concerning the future of the rights to conserved water.

The uncertainties regarding rights to conserved water in Idaho point to the need for legislative action. The legislature should clarify the meaning of developed, salvaged, and conserved water and draft laws that define the rights to each. It should further address issues such as transferring conserved water to other lands so that beneficial uses of this limited resource can be maintained. Finally, environmental considerations that accompany conservation should be carefully weighed. The best choice will be to allow appropriators who conserve water on their lands to be rewarded for their efforts by granting them a property right in such waters. This task of straightening out and clarifying the tangle of Idaho case law would best be done through legislative action defining the rights of Idaho appropriators.

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69. Whether the sale of conserved water should or should not be allowed is beyond the scope of this article. However, the "no injury rule" may serve as a sufficient check to insure adequate return flows and the protection of junior appropriators.